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IN THE

# Supreme Court of the United States

October Term, 1961

No. 191

LEO L. LOWY,

*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

### Justice Under Law Denied Petitioner

In our petition we give the following reasons for granting the writ:

1. Devoid of supporting proof, the judgment under review contravenes the "due process clause" of the Fifth Amendment. *Petitioner stands convicted without a scintilla of proof of guilt.*

2. Error was committed in holding (in conflict with the decisions of other Courts of Appeals on the same subject), that, under Federal Tax Law and the U. S. Rules of Civil Procedure, a Trial Judge *has the right under the law* to ignore positive, uncontradicted and unimpeached proof of witnesses decisive of the fact issue before him.

3. Error was committed in ignoring and in failing to make findings in respect of uncontradicted, unimpeached proof of witnesses called by respondent upon the crucial issue of fraudulent intent where their proof completely exculpated petitioner of any taint of fraud (Pet. p. 13).

Respondent's brief is singularly barren of response to these points. Instead, respondent places main reliance for rejection of this petition, upon the ground that since both courts below "upon full consideration of all the facts" had decided against a petitioner—that ends it (Resp. Br. 5). By progression of such logic it means that this court should not be concerned with a searching analysis of the record to determine if *indeed the courts below gave full consideration to all the facts.* This Court in *Comm'r* v. *Sumen*, 333 U. S. 591—p. 607—states the standard and criteria to be applied in reviewing Tax Court's decision in the following language:

> "And it is well established that its decision is to be respected on appeal if firmly *grounded in the evidence and if consistent with the law. Comm'r* v. *Scottish American Co.*, 323 U. S. 119, 65 S. Ct. 169, 89 L. Ed. 113; *Dobson* v. *Comm'r*, 320 U. S. 489, 60 S. Ct. 239, 88 L. Ed. 248. That is the standard, therefore, for measuring the propriety of the Tax Court's decision on the merits of the controversy in this case." (Emphasis supplied.)

It is our position that the two courts below did not rest their decision upon a consideration *of all the proof* but to the contrary, in violation of basic law, ignored proof decisive of the critical issue, with resultant judgment that runs afoul of the due process mandate.

The crucial issue is simply put. Under Federal Law, the burden of proof of fraud rests upon respondent. He

must prove that at the time the 1944 Tax Return under review was signed on *May 15th, 1945* taxpayer fraudulently intended to conceal scrap sales proceeds of some $13,500 to avoid tax. *The time element here is of transcending importance!* Respondent's sole reference on the issue of fraud relates to a deposit of these scrap proceeds during 1944 in non-business bank accounts. He, however, sedulously avoids any reference to the decisive, unimpeached, affirmative, exculpatory proof by accountant Berger that in February, 1945, he was informed of the scrap and explicitly cautioned about its inclusion in the 1944 tax return. Our point that this exculpatory proof binds respondent, since uncontradicted and unimpeached, remains unanswered. That is the point that was ignored by the courts below.

In view of the gravity of the issue we again summarize the decisive proof which we contend *no court has the power to ignore*, since uncontradicted, unimpeached and not inherently incredible.

(1) Berger, respondent's witness, testified that when first retained in *February 1945*, he was told of petitioner's prior tax troubles involving 1941, 1942 and 1943—(Apx. 126a); that petitioner wished the establishment of an accurate and more business-like bookkeeping system to replace the crude and primitive system carried by part-time accountant, Liebowitz; that he was *then (February, 1945) explicitly cautioned by petitioner as well as* his then attorney, Garfield, *to pick up the scrap sales* when preparing the 1944 tax returns; that petitioner wished to avoid future tax troubles!

(2) Berger, *in preparing the return, discussed the scrap sales with Lowy* and did not press him for the details "because of the fact that he (Lowy) was burdened with a

great deal of work *at the time*" (*not because of any evasion or concealment*) and more importantly, because "* * * *I, (Berger) didn't consider it important at that time for the reason that the volume of business was not so great that the scrap sales could amount to any very considerable sum* * * * not to amount to anything to offset $200,000 * * * *" (Apx. 123a).

(3) Berger explicitly testified that the scrap information was furnished "*when we were working on it*" (R. 218, Apx. 123a).

(4) Berger intended to file an amended return when relieved of the press of work. The 1944 return he considered as a "*tentative return*" and so labelled his bill, *dated January 9th, 1946*, for services (Apx. 128a).

(5) Berger advised *Lowy that he could sign the tax return absent scrap proceeds, "because I didn't consider it too important at the time!"* Finally, Berger testified, that notwithstanding his *knowledge of omission* of scrap sales from the 1944 tax return, *he advised petitioner nevertheless to sign it* (Apx. 123a).

Thus Berger swore:

> "Q. Do you believe in your heart and soul that the return that you filed was accurate enough so that Mr. Lowy could *rely on your opinion and sign it, is that right?* A. *That is right*" (Apx. 133a).

In April 1946 Berger was discharged because petitioner discovered an error in ordinary accounting, the omission of the November and December sales, approximating $190,000, from the 1944 tax return (Apx. 133a-134a) conceded to be without imputation of fraud (Apx. 134a).

(6) *Respondent's witness*, Miller, employed in April, 1946, to supplant Berger, on recommendation of the *New York State Society of Certified Public Accountants* (Apx. 78a) concededly an accountant of highest qualifications and calibre, testified:

> "* * * I had been engaged by Mr. Lowy to amend *both the years—if necessary—amend* '44 and prepare '45. The first thing he told me when I was engaged was that that was the thing to do—was to *amend the '44.* I was told *that by the people at the State Society, who sent me down, that he was looking for someone to do that*" (Apx. 81a).

We repeat that the crucial issue is intent at the time of the filing of the return. *The point is—did petitioner intend to conceal the scrap when he signed his tax return on April 15th, 1945?* The above clear and explicit proof of respondent's witnesses upon that critical issue gives a ringing answer in the negative.

The Court of Appeals wrote in pertinent part:

> "It is true that the return was prepared under great pressure, and with some reserve as to its final correctness; indeed in the bill rendered by Berger to the taxpayer, he described his work as 'preparation of a tentative tax return,' a description which in his testimony he called 'ill-chosen', except as it meant that he 'intended to file an amended or corrected return.' He did not, however, suggest in the return itself anything of the kind. It would, of course, have been possible that these six items were omitted in 1944 by accident, but **Berger did not give this as his reason.** Rather, he said that there was such a large deficiency in income—about $200,000—that 'any adjustments of

> income would have to be very, very considerable in order to overcome that deficiency.' That would have had some plausibility, were it not for the fact that, as we have said, the taxpayer had made the same kind of omission in 1942 and 1943, for both of which he was later held liable" (Pet. pp. 31-2).

The Court overlooks (a) the uncontradicted proof of *respondent's own witnesses* that the miscalculation which induced Berger to omit scrutiny of the scrap sales depositories and their inclusion in the return, was *Berger's miscalculation;* (b) that failure to note on the tax return that taxpayer intended to file an "amended or corrected return; was Berger's oversight and not taxpayer's; and finally, (c) the unchallenged proof that *Berger was told of the scrap proceeds and cautioned about their inclusion.*

*No judgment may rest on a fragment of proof when the proof read in its totality gives to it an entirely different meaning and effect.*

It is unmistakably clear that the Court of Appeals supports the Tax Courts judgment on the bases of inferences flowing from a pattern of activity because of omission of scrap in prior years. But to assume that petitioner in the year under review—after his prior dereliction—remained unrepentant and unregenerate in the face of uncontradicted, affirmative, binding, live proof that he was seeking to prevent further trouble by hiring accountant Berger, is to substitute speculation for proof! Otherwise put, that Court's reasoning appears to be that when suspicion collides with immutable fact, fact must yield to suspicion.

The error here is all the more glaring when viewed in the light of fact that petitioner was indicted on May 15th, 1945 in the U. S. District Court, Brooklyn, New York on the charge of wilfully failing to report the $13,500

scrap proceeds from his 1944 tax return and in claiming excessive depreciation (Apx. 142a). He was found "*not guilty*" on all counts (R. 288-90).

We have shown that the judgment is supported by nothing stronger than suspicion resting upon a fragment of irrelevant proof torn out of context. *The proof decisive of the issue is ignored. In sum, notwithstanding that petitioner was found innocent of fraudulent evasion of the scrap from the 1944 tax return; notwithstanding that for his imprudence in the prior years, he already paid the shockingly severe civil penalties exacted by law; notwithstanding the unimpeached proof of respondent's witness, Berger that when he was hired in February, 1945, the scrap was disclosed to him for the compelling reason that petitioner wished to avoid trouble, he must nevertheless, to the end of his days, bear the brand of Cain and suffer repeated punishment for the same offense.*

The novel theory that there is a presumption of guilt finds no support in law and is interdicted by Constitutional mandate. The record here presents palpable, legal error and should be reviewed. No judgment may stand resting upon suspicion where such suspicion is countervailed and negated by decisive, binding, affirmative, live proof. A judgment resting upon such a finding "* * * *offends the* dictates of reason, offends the due process clause". *Schary* v. *Board of Examiners*, 353 U. S. 232.

## Basis of Assessment

It would not be amiss to examine into the basis of the staggering tax deficiency under review. In the main, it results from a capital gains assessment upon acquisition by petitioner of machinery and equipment upon dissolu-

tion of his wholly owned American Rolbal Corporation in 1943 (Apx. 39a-44a). In the *Rolbal* case, *supra* (T. C. Memo—1954—67 "Aff'd on findings below" 220 F. 2d 749), petitioner contended that the value of this identical machinery and equipment for years under review, 1941-2-3, for purposes of depreciation was $3,600,000, whereas respondent in that proceeding challenged petitioner and contended that the value was not more than $1,000,000. The Court adopted respondent's contention with the result that $260,000 was struck from Rolbal's claimed depreciation for the years there in issue, 1941, 1942 and 1943. This reduction in depreciation resulted in an aggregate tax consequence to petitioner, individually and as transferee of Rolbal in the sum of approximately $600,000 which was fully paid.

In the proceeding under review, respondent did a complete turn-about. By amendment, granted, *ex parte*, on the eve of the trial of this proceeding, he switched his position and now claimed that for capital gains purposes these identical assets had magically increased in value from $1,000,000 (as found by the Tax Court upon respondent's insistence in the *American Rolbal* case, *supra*), to $3,600,000. This claim became belatedly apparent to respondent *some 11 years after the tax return* under review was filed. First, respondent claimed that the value of $3,600,000 asserted by petitioner was fraudulent; but after the ordeal of trial and following a verdict of "not guilty" on the issue (Apx. 142a) respondent turns about and claims the value to be precisely as asserted by petitioner. Respondent here assumed a Heads-I-Win—Tails-You-Lose position (Apx. 61a).

By application of highly technical tax law that emphasized form but did violence to substance, respondent's position was sustained—that the same, identical machin-

ery at the same time, had one value for one tax consequence and another value for another. The resulting capital gain of $2,600,000, brought about a staggering assessment, though concededly no economic gain in any real sense accrued to petitioner. Taxpayer who finds himself thus caught on both ends of the tax whipsaw, finds little comfort in the argument that relief from such abuse within the framework of the law must come from Congress.

This assessment resulted in a tax, inclusive of fraud penalty (though no fraud was ascribed to this item) plus 100% interest in a sum aggregating $1,600,000.! Appropriate and apposite are the comments of Mr. Justice Douglas in his concurring opinion in *C. I. R.* v. *Vester*, 81 S. Ct. 1343—p. 1348.

> "While I join the opinion of the court, I add a word. In an early income tax case, Mr. Justice Holmes said '*Men must turn square corners when they deal with the Government.*' *Rock Island A. & L. R. Co.* v. *United States*, 254 U. S. 141, 143, 41 S. Ct. 55, 56, 65 L. Ed. 188. The Revenue laws have become so complicated and intricate that *I think the Government in moving against the Citizen should also turn square corners.*" (Emphasis supplied.)

## Conclusion

This case is a matter of economic life or death to petitioner. The record shows that he is past 72 years of age and in ill health. For his imprudence in past years he paid a shockingly ferocious penalty. The Fifth Amendment interdicts double punishment for the same offense.

Petitioner has been denied justice under law because:

(a) The judgment is devoid of supporting proof.

(b) Error was committed in holding (in conflict with the decisions of other Courts of Appeals on the same subject), that, under Federal Tax Law and the U. S. Rules of Civil Procedure, a Trial Judge *has the right under law* to ignore positive, uncontradicted and unimpeached proof of witnesses decisive of the fact issue before him.

(c) Error was committed in ignoring and in failing to make findings in respect of uncontradicted, unimpeached proof of witnesses called by respondent upon the crucial issue of fraudulent intent where their proof completely exculpated petitioner of any taint of fraud.

The issues presented in the petition have not been answered by respondent. If they had an answer they should have come forth with one.

**The petition should be granted.**

Respectfully submitted,

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